IN THE UNITED STATES SUPREME COURT

THE GOOD HOLDING COMPANY, CAROLYN G. GOOD TUCKER and OWEN TUCKER,

Petitioners,

versus

FRANCES B. BOSWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered March 8, 1949, rehearing of which was denied April 19, 1949, affirming the judgment of the District Court for the Southern District of Florida, entered on July 15, 1947, in a civil action for malicious criminal prosecution between citizens of different states.

OPINIONS BELOW

The opinion of the court below and a dissenting opinion filed on March 8, 1949, are set forth in the accompanying transcript (R. 391-412), but have not yet been published. There was a dissent but no opinion on denial of rehearing.

BASIS OF JURISDICTION

Federal jurisdiction rests upon diversity of citizenship and the amount in controversy, as provided by Title 28, **United States Code,** section 1332(a)(1).

Review by writ of certiorari is invoked under Title 28, **United States Code,** section 1254(1).

The opinion of the court below, together with a dissenting opinion and judgment, was filed on March 8, 1949. Petition for reahearing was filed on March 26, 1949, and was denied on April 19, 1949, one judge dissenting. An order of the Court of Appeals staying the mandate for thirty days pending the application to this Court for writ of certiorari was entered on April 27, 1949.

QUESTIONS PRESENTED

In a civil action for malicious criminal prosecution, *where the local law is clearly to the contrary,* did the Court of Appeals err in sanctioning the conduct of the District Court in presenting the case to the jury, wherein:

(1) The District Court refused to submit the question whether any of the defendants did in fact institute the criminal prosecution of the plaintiff.

(2) The District Court instructed that if one of three defendants was guilty, all were, though the only evidence of malice or of instigation was as to one of the defendants.

(3) The District Court so defined malice that any prosecution to stop stealing would be malicious.

(4) The District Court, in its charge on the measure of damages, specified only that the verdict could not exceed the amount claimed in the complaint, with the result that judgment was for the plaintiff in the amount of $7000 though plaintiff was in jail but one night, and there was no evidence of actual damage.

Two judges of the Court of Appeals, without discussing any local decisions, affirmed the conduct of the District Court. The third circuit judge, in a written opinion, dissented on the ground that each of the foregoing instructions given by the District Court was in clear disregard of local law.

SUMMARY STATEMENT

Respondent sued the petitioners in the District Court for the Southern District of Florida for malicious criminal prosecution.

On April 4, 1946, respondent had been employed for two weeks as cashier in a cocktail lounge operated in and by the Good Hotel. While at work during the evening of that day, respondent, together with two other employees, was arrested by deputy sheriffs acting under warrants, the validity of which have never been questioned. Respondent was charged with embezzling money from the hotel. She was in jail over night and was released on bond the following day. The charges were dismissed in the Criminal Court of Record on April 25th, because the evidence offered tended to prove theft of liquor rather than embezzlement of cash.

Respondent contended that the petitioners caused her

arrest, that they acted maliciously and without probable cause. The evidence showed that for three months there had been thefts of either liquor or cash or both from the lounge; that Owen Tucker, self-appointed manager of the lounge, employed a firm of private detectives to investigate; and that the firm submitted a written report to him covering investigations made during the period when respondent was employed, which showed that all of the employees pocketed money paid by customers for their drinks. Owen Tucker and his wife, who was an officer and majority stockholder of the corporation which owned and operated the hotel, both testified that they had seen each of the employees steal.

On April 1st, Owen Tucker went to his insurers with these reports. The insurers indemnified his loss. Shortly thereafter he received a call from the county solicitor's office asking him to appear, which he did. The solicitor questioned him, and it is not disputed that he answered truthfully. The solicitor obtained the name of the detective agency and subsequently interviewed the detectives. No affidavits were made by anyone. The matter was left to the *uncontrolled* discretion of the solicitor. There is evidence that at the time of the arrests, petitioners did not even expect that respondent would be arrested.

The only evidence of malice on the part of any defendant was the testimony by the respondent that she had heard Owen Tucker say: "Boy, we've got the goods on them this time. Ten years is a long time for embezzlement." There was no friction between the employees and their employers. There was no interference on anyone's part with the subsequent employment of the arrested employees who had no difficulty in getting other work.

The District Court's instructions on the questions raised by this petition were as follows:

On defendants' instigation of prosecution—

> "The question that you have in analyzing this testimony is not whether or not the defendants brought about this prosecution, instituted it, but whether or not they in good faith made a full, fair and complete disclosure of all the facts to the prosecuting attorney, and when you sift the case down that is going to be what you gentlemen are going to have to decide on this testimony." (R. 298).

On the issue of agency—

> "If there is any liability in this case, if you gentlemen find any liability in this case to the plaintiff, then the conduct of these individuals, the defendants, makes the hotel liable." (R. 297, 296, 288, 64).

On the issue of malice—

> "In a case of this character, malice does not have a technical meaning of a personal hatred or dislike of the individual prosecuted. It may mean that the person bringing about the prosecution was prompted by motives they consider advantageous to them in causing the prosecution to be brought about." (R. 295).

On the issue of damages—

> "The amount of damages is a matter for you gentlemen to determine, an amount that you gentlemen as business men are authorized to determine in your best judgment, of course, not to exceed the amount claimed in the complaint in this case." (R. 298).

The verdict and judgment were for the plaintiff in the amount of $7000.

REASON FOR GRANTING THE PETITION

On each of four vital issues in this case, the District Court gave instructions which plainly ignored the settled law of the State of Florida, which law the federal court was bound to apply. It is, indeed, doubtful if there is precedent anywhere for these instructions.

Two justices of the Court of Appeals approved the instructions given by the District Court in an opinion which cites two Florida decisions and one Texas decision, but relies primarily on eight federal decisions, one of which was reversed by this Court in 1899. **Spurr v. U. S.**, 87 F. 701 (C. C. A. 6th 1898); rev'd. 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

The majority opinion nowhere discusses the adequacy of the trial court's charges, other than to say that "we find no prejudicial error", nor does the opinion discuss any of the Florida decisions in point. It is apparent, not only from the decision, but from the opinion that the Court of Appeals refused to apply the local law, despite

this Court's holding in **Erie R. R. v. Tompkins,** 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

The opinion of the dissenting circuit judge, who relied entirely upon Florida decisions and the **A. L. I. Restatement,** sharply and fully demonstrates the error in the majority opinion.

The case is small. The issues may lack color and are, perhaps, tinged with little national significance. But the clear refusal of our District Court and of the Court of Appeals for the Fifth Circuit to recognize the doctrine of the **Erie** case fully merits this Court's attention.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

JOHN SIRICA,
E. F. P. BRIGHAM,
Attorneys for Petitioners.

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PETITIONERS' BRIEF

This brief is in support of a petition that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered March 8, 1949, rehearing of which was denied April 19, 1949, affirming the judgment of the District Court for the Southern District of Florida, entered on July 15, 1947, in a civil action for malicious criminal prosecution.

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SUMMARY STATEMENT

The Pleadings:

Jurisdiction rests upon diversity (R. 2-3).

The plaintiff alleges that The Good Holding Company acting through its president, Carolyn Tucker, and its employee, Owen Tucker, manager of the cocktail lounge, and the defendants, Carolyn Tucker and Owen Tucker, maliciously and without probable cause caused the plaintiff's arrest, on a charge subsequently dismissed, and that the plaintiff was thereby damaged (R. 2-5).

The defendants admitted the arrest and the dismissal of the charges, but denied causing the arrest, denied that the charges were lodged maliciously, denied that they were without probable cause, and denied the agency of Owen Tucker for the Good Holding Company and for Mrs. Tucker. The defendants further answered that the

information and warrant were filed by the county solicitor upon independent investigation, and that the plaintiff's arrest and prosecution were the acts of the State and were in no way caused by the defendants. (R. 5-10).

The Trial:

Undisputed evidence of the witnesses for both parties disclosed the following:

In 1946, The Good Holding Company owned the Good Hotel in which there was a cocktail lounge, the Music Box Club. Mrs. Carolyn Tucker was the majority stockholder, president, and treasurer of the holding company. (R. 210). She, together with a manager, not to be confused with Mr. Tucker, operated the hotel. After his discharge from the army in January, 1946, Mrs. Tucker's husband, Owen Tucker, assumed certain duties in the cocktail lounge (R. 93, 253, 106). He did not consider himself an employee or agent of the company (R. 94), nor did Mrs. Tucker consider him one. "All I did was to try to help my wife, who was sick" (R.94).

During the period from January through March, 1946, the hotel auditor's report had indicated a marked fluctuation in the cost of sales at the cocktail lounge. The Tuckers were advised that this indicated either shortages in the liquor delivered, thefts of the liquor in stock, or thefts of money paid for the liquor sold (R. 101, 123, 154). In an effort to eliminate this loss, Owen Tucker personally checked every bottle received (R. 75). He reinforced the liquor store room and installed a "French key" lock, retaining the key himself (R. 71, 74). He reinforced the counters where display liquor was stored after closing

(R. 74, 84). The losses continued. He then detected the cashier and other employees in the lounge pocketing receipts (R. 73). In the course of replacing them (R. 72), Frances Boswell, having been recommended by an agency, was interviewed and employed by Tucker on March 18, 1946, as checker and cashier (R. 102).[1]

It was her responsibility to see that cash or a signed check was received for each item of stock dispensed (R. 25-26, 89, 109, 114). It was further her responsibility to balance the cash register account against the cash in the till. She never left her post, taking her meals behind the register (R. 138).

She was on duty from 5:00 P. M. to 1:00 A. M., six days a week (R. 27). The lounge was also open in the afternoon, but the business done was negligible. When she reported, occasional discrepancies never as much as a dollar, which resulted from the afternoon sales, were corrected and she began with a clean slate (R. 137). There were two bartenders and two waiters in the lounge. Drinks were also picked up by room service waiters. These orders, as well as those within the lounge, went through Frances Boswell's register. A small beach bar was operated independently (R. 108).

On March 30th, Tucker contacted the Miami Detective Agency and employed them to discover the cause of the discrepancy revealed by the hotel audit (R. 214, 100). He had no particular culprit in mind (R. 207). The agency advised him to install a new cash register which would provide a visible record of the account of each charge as

[1] Frances Boswell testified that she began on March 15th (R. 25), but appeared to have been confused (R. 54).

the charge was made. Tucker installed the new register on March 27th (R. 103, 168).

The register maintained two tallies, one of the orders filled, the other of cash received (R. 152). The cashier thus had a double duty. She had to effect a balance between the tally of sales made, on the one hand, and the cash in the till plus the signed checks, on the other.

On March 29, 1946, two days after he had installed the new register, Mr. Tucker and his wife went to Cuba for three days (R. 129). During this period six operators from the detective agency observed the employees in the cocktail lounge (R. 100, 215, 221). On the afternoon of March 29th (R. 223), two of the operatives,[2] one of whom had been a bartender himself, made an ounce by ounce inventory of the liquor in the lounge (R. 232). In the evenings, they and the two other detectives visited the lounge and prepared reports on the conduct of the lounge employees (R. 377, 384). On April 2nd, a second inventory of the liquor was made (R. 368-376).

When Mr. Tucker returned from Cuba, he received the report from the detective agency which disclosed that there was a difference between inventories of $1179.55 worth of liquor (R. 191).

He and the detectives compared this figure with the

[2] The record discloses something of the qualifications of these men. John W. Canada had two years experience with the agency. Prior to the war, he was on the police force. Before that he had been a deputy sheriff (R. 254). At the time of the trial, he had become an auditor for the Florida National Bank (R. 253). Archie W. St. John had worked for the agency for close to two years. He had done investigative work for the Army Intelligence for fifteen years (R. 214).

sales recorded during the period. There was a discrepancy of $311.65 (R. 191). He found, in addition, that the register tallies of cash received during the evenings covered by the inventories exceeded the cash on hand by $10.80 (R. 148). He noted the detective agency's report (R. 377-384), excluded from evidence, which accompanied the two inventories (R. 368-376), admitted in evidence. With this evidence, and with other evidence in dispute, he went, on April 1st or 2nd, to his insurers who covered him against such losses (R. 162). His claim was subsequently paid (R. 124).

Shortly thereafter he received a call from the county solicitor's office (R. 98). He went there together with Mrs. Good (R. 15[illegible]). They were asked who owned the hotel. Mrs. Good gave the facts (R. 210). They were asked, "What is your trouble—What is wrong?" (R. 128). Mr. Tucker then showed the solicitor the detectives' reports including the inventories (R. 130, 268). The solicitor asked for and was given the names of the detectives (R. 249). Mrs. Tucker made no complaints (R. 209). Tucker stated what he had seen (R. 211).

After this first interview, Tucker was again called to the solicitor's office. He went alone (R. 159, 260), but met there the detectives who had taken the inventory (R. 121). They had also been called by the solicitor. They were questioned briefly (R. 147, 257, 158). They answered his questions fully and truthfully (R. 221, 234). The solicitor said that he would file an information (R. 220, 257). Nothing was said about who would be arrested or when the arrests would take place (R. 125, 146).[3] No oaths were

[3] John Canada testified, with some hesitation, that the names of the persons to be arrested were mentioned, but agreed that no time of arrest was discussed (R. 263-264).

given (R. 159). Neither the detectives nor Tucker signed an affidavit, information or warrant (R. 120, 177, 178). Nothing further was said.

At about 10:00 P. M. on April 4th, two deputy sheriffs appeared at the lounge with warrants (R. 31). The validity of these warrants is not questioned. They took the bartenders into a dressing room. Mr. Tucker, thinking the arrests over (R. 121), then introduced a new bartender to Frances Boswell and told her to break him in, saying "Murphy won't be with us any longer" (R. 31, 32, 66). The sheriffs took the waiter into the dressing room. Five minutes after Tucker had introduced the new bartender to Frances Boswell, she, Murphy, a bartender, and Clifford, a waiter, were arrested (R. 66). Burke, the other bartender, had left the lounge before the arrival of the sheriffs. He was arrested subsequently (R. 42).

The plaintiff was placed in jail over night and released on bond the following day. The arrested employees were bound over after a hearing on April 11th (R. 37). They were tried in the Criminal Court of Record on April 25th and the charges were dismissed after two of the state's six witnesses had been called. The entire proceedings are in the record (R. 182-198). The charge was embezzlement of $311.00 cash. The detective that testified was confused by the court's questioning (R. 230-231). Upon his failure to testify to the conversion of cash rather than liquor, the court dismissed the charges.

Frances Boswell was employed one week between the hearing and the trial (R. 36). She also worked for a month to six weeks as cashier after the trial. She then returned to Indianapolis (R. 43). In October she worked as a hat

check girl until she left because she was not being paid enough (R. 46). She stated that Tucker did not interfere with her subsequent employment (R. 46). Burke, one of the arrested bartenders, in testifying for the plaintiff, stated that after the arrest he worked when he wanted to (R. 92).

The above account emerged from the unchallenged evidence of witnesses for both parties. The matters discussed below were disputed.

Frances Boswell testified that she had heard Owen Tucker say to his wife at the hearing, "Boy, we've got the goods on them this time. Ten years is a long time for embezzlement." (R. 42).

The defendants denied any malicious spirit whatsoever (R. 119, 199) and denied that they had in any way instituted or pressed the arrests. The plaintiff and her witnesses admitted that no malice, ill-will or lack of consideration had been shown by either of the Tuckers apart from the above statements imputed to Mr. Tucker (R. 64, 58).[4]

As to the actual conduct of the employees in the lounge, there was a sharp conflict in the testimony. The arrested employees and one previously discharged bartender denied that there had been any deviation from that prescribed for them by Mr. Tucker (R. 76, 265). The

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[4] "Counsel for Defendant: She (Mrs. Tucker) was always a perfect lady in her dealings with you?
Michael Gordon (discharged bartender): Yes.
Q. The only man you made any complaint against then is Mr. Tucker?
A. I did not have any complaint against him" (R. 82).

procedure to be followed, as noted above, was not disputed. The employees further testified that there had been no complaints of their conduct (R. 28, 45, 67, 73).

Mr. and Mrs. Tucker and the detectives, on the other hand, each testified that on numerous occasions they had seen Frances Boswell ring up less cash than she received, ring up a charge much lower than the price for the liquor served (R. 202-204, 219, 255), and transfer money from the till to her purse (R. 201). "It is evident that the checker, waiters, and possibly the bartender, are working together" (R. 377).

The detectives testified that they had seen Frances Boswell, as well as waiters and bartenders, write an amount on a slip of paper, present it to customers and pocket the proceeds, nothing being recorded on the register and nothing finding its way into the till (R. 204, 217, 218, 255, 261, 263, 111). The detectives also testified that they had ordered imported liquor, had received domestic liquor, had been charged the price for the former, and had seen no check but had seen the sale recorded at the price of beer (R. 217-219).

Frances Boswell stated that her register tallies had always checked within at most a few pennies, though she often stayed an hour or longer checking them with Mr. Tucker (R. 55, 265). She stated they were always reconciled (R. 28, 58). Mr. Tucker exhibited a book in which he had recorded the discrepancies (R. 162), indicating that the tallies checked on only one night (R. 132, 166). The discrepancies varied from 40c to $18.10 (R. 148, 134). He

was never able to reconcile them (R. 133).[5]

On the night before Frances Boswell's arrest, Mr. and Mrs. Tucker had stood over her the whole evening. On that occasion $18.10, more in cash was received than was accounted for by the charges (R. 134, 136).

Trial Court's Theory of the Case:

The court filed no opinion. It is, however, clear from the charge that the Court considered the sole issue to be a narrow question of fact.

> "The question that you have in analyzing this testimony is not whether or not the defendants brought about this prosecution, instituted it, but whether or not they in good faith made a full, fair and complete disclosure of all the facts to the prosecuting attorney, and when you sift the case down that is going to be what you gentlemen are going to have to decide on this testimony. There is some conflict there on that. As you recall, the plaintiff testified that during her entire employment that she was never checked up short except just a few cents variation and that they always reconciled those small errors that were found on her tape at the end of her day's work. That is the testimony of the plaintiff.
>
> "The testimony of the defendant is, as you will recall, that the plaintiff was continuously short in her accounts. Now, there is a conflict and there is a conflict you gentlemen have to reconcile" (R. 298-299).

[5] That the figure $8.10 (R. 148, line 15) should read $18.10 is apparent from the testimony which follows immediately.

The issue of agency was withheld by the Court from the Jury (R. 296-297).

Reserving its ruling (under Rule 50) on defendant's motion for a directed verdict (R. 279), the Court sent the case to the Jury. The Jury returned a verdict in favor of Frances Boswell for $7000 (R. 304).

Defendant's motion for a new trial on the grounds of newly discovered evidence as well as error in the original trial, and defendant's motion to amend were denied (R. 384). Thereupon the judgment (R. 309) became final, and from it defendant appealed.

Proceedings in the Court of Appeals

The judgment for the plaintiff was affirmed by the Court of Appeals for the Fifth Circuit by two members of the court on March 8, 1949. (R. 413). Petition for rehearing was denied on April 19, 1949 (R. 418). One circuit judge dissented to both orders. The mandate was stayed for thirty days by an order entered on April 27, 1949.

The majority opinion reviews the testimony extensively (R. 391-402) and concludes that the verdict finds support in the evidence (R. 402). The majority next, in one page, concludes that there is "no prejudicial error in either the oral charges given, or the requested charges refused." (R. 404). The charges are not discussed, nor is the law reviewed. Two federal decisions are cited as direct authority, and two Florida decisions are cited as parallel authority for this conclusion (R. 404).

The dissent takes the position that in four particulars

the District Court erred in presenting the case to the jury (R. 405-412). The dissent relies on five Florida decisions, discussing two of them with some particularity.

SPECIFICATION OF ASSIGNED ERRORS

In this civil action for malicious criminal prosecution, *where the local law is clearly to the contrary*, the Court of Appeals erred in sanctioning the conduct of the District Court in presenting the case to the jury, wherein:

(1) The District Court refused to submit the question whether any of the defendants did in fact institute the criminal prosecution of the plaintiff.

(2) The District Court instructed that if one of three defendants was guilty, all were, though the only evidence of malice or of instigation was as to one of the defendants.

(3) The District Court so defined malice that any prosecution to stop stealing would be malicious.

(4) The District Court, in its charge on the measure of damages, specified only that the verdict could not exceed the amount claimed in the complaint, with the result that judgment was for the plaintiff in the amount of $7000, though the plaintiff was in jail but one night and there was no evidence of actual damage.

ARGUMENT

I.

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE QUESTION WHETHER ANY OF THE DEFENDANTS DID IN FACT INSTITUTE THE CRIMINAL PROSECUTION OF THE PLAINTIFF.

1. **An appropriate request to charge was made, refused and excepted to.** The following request to charge was made by defendants below:

> "We would like for you to instruct the jury to the effect that if either Mr. or Mrs. Tucker did not know that this particular lady was going to be arrested upon the information that was communicated to them by these detectives, that under those circumstances they could not be held liable for her arrest." (R. 288).

The trial court denied the request and noted an exception:

> "I deny that charge. I will deal with it in a charge of my own . . . Let the record here show that exceptions are allowed to each counsel for each party to my refusal to give the charges requested as requested and an exception is allowed counsel for each, plaintiff and defendants, to the charges I give on my own account." (R. 289).

2. **The trial court's charge in effect removed the issue from the jury.** The charge of the District Court on the

question of whether the defendants instituted criminal prosecution against the plaintiff was as follows:

> "The question that you have in analyzing this testimony *is not whether or not the defendants brought about this prosecution, instituted it*, but whether or not they in good faith made a full, fair and complete disclosure of all the facts to the prosecuting attorney, and when you sift the case down that is going to be what you gentlemen are going to have to decide on this testimony." (R. 298).

3. **The trial court's instruction was in direct conflict with local law.** In a consistent line of cases, the Supreme Court of Florida has held that the instigation of the criminal proceeding by the defendant is the first of five elements each of which the plaintiff must prove or suffer a directed verdict. In **Ward v. Allen,** 152 Fla. 82, 11 So. 2d 193, 194 (1943), the Florida court said:

> "To succeed in his suit it was plaintiff's burden to prove: (1) the instigation of the criminal proceeding by the defendant; (2) its termination in favor of the plaintiff; (3) the exercise of malice by the defendant; (4) want of probable cause for the prosecution; and (5) damage. As we understand our former decision these elements must concur and the failure to establish any one of them by a preponderance of the evidence would be good ground for the granting of a motion for a verdict favoring the defendant."

Identical language is used by the court in **Tatum Bros. Real Estate & Inv. Co. v. Watson,** 92 Fla. 278, 109 So. 623, 626 (1926); **Duval Jewelry Co. v. Smith,** 102 Fla. 717, 136

So. 878, 880 (1931); **S. H. Kress & Co. v. Powell,** 132 Fla. 471, 180 So. 757, 762 (1938). This is also the language of the **A.L.I. Restatement, Torts,** v. 3, §672(1).

It is settled in Florida that the advice of counsel based on a complete disclosure is a complete affirmative defense, **Duval Jewelry Co. v. Smith,** ibid.; and similarly that the advice of a prosecuting attorney based on a complete disclosure is a complete affirmative defense. **Florida East Coast R. Co. v. Groves,** 55 Fla. 436, 46 So. 294, 297 (1908).

It is clear, therefore, that the District Court confused the requirements of a complete, affirmative *defense* with those of an *element* which the plaintiff had the burden of establishing. The effect of this confusion was to relieve the plaintiff of his burden to prove instigation by the defendant, and to impose upon the defendant the burden of exonerating himself.

Full disclosure has nothing to do with the question of whether the defendant instigated the prosecution. As stated in 1 **Cooley on Torts,** 413-414:

> "If one merely furnished the prosecuting officer with the facts, and the latter, on his own judgment, commences a prosecution, making use of the former as a witness, this is not a prosecution by the witness, and unless he interferes improperly afterwards, he cannot be held responsible as having instituted it, and the mere fact that, as a witness, he wilfully and maliciously gives false testimony will not render him liable for malicious prosecution."

To institute a criminal prosecution, one must force the

authorities into action; merely giving information or making accusations does not instigate a prosecution. In the language of the **A.L.I. Restatement, Torts,** v. 3, §653:

> "Criminal proceedings are initiated by making a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused. Thus . . . a sworn charge upon which a warrant of arrest is issued, initiates the criminal proceedings of which the issuance of a warrant is the institution . . . It is, however, not enough that some act of his should have caused the third person to initiate the proceedings . . . The giving of information or the making of the accusation, however, does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit."

The plaintiff in this action was prosecuted in the Criminal Court of Record, Dade County, Florida. **Florida Statutes Annotated** (1941) §32.18; C.G.L. 1927, §8257 provides that:

> "All offences of which the criminal court of record has jurisdiction, shall be prosecuted upon information filed by the county solicitor under oath."

Prosecution in this court is thus always left to the uncontrolled discretion of the county solicitor. No one made sworn charges against the plaintiff. (R. 159). It is undisputed that the solicitor obtained information from others, as well as from the defendants (R. 121). Of the

tests set forth in the **Restatement**, therefore, none were present in our case.

Turning to the Florida decisions, there are only four decisions in favor of the plaintiff. In three cases the defendant had signed a paper which had the legal effect of forcing authorities into action. **Tobey v. Orr**, 92 Fla. 964, 111 So. 110 (1926) (affidavit before justice of peace); **Anderson v. Bryson**, 94 Fla. 1165, 115 So. 505 (1927) (affidavit before magistrate); **Perez v. Rodriquez**, 155 Fla. 501, 20 So. 2d 654 (1945) (lunacy petition). In the remaining case, the earliest one, the opinion does not show what the defendant did. **Lewton v. Hower**, 35 Fla. 58, 16 So. 616 (1895).

In **Fisher v. Payne**, 93 Fla. 1085, 113 So. 378, 381 (1927) the court in an action for malicious prosecution held that to "institute a lunacy proceeding, a defendant must be shown to have taken the statutory step which starts the proceeding, i. e. file the lunacy petition. And in its most recent malicious prosecution case, the Florida court specifically held that instigation was established where the defendant signed an affidavit which was the sole basis for both the warrant and the affidavit. **Ward v. Allen**, 152 Fla. 82, 11 So. 2d 193, 194 (1943).

The Florida court has, therefore, consistently required the plaintiff to prove that the defendant made the sworn written charges which in law initiated the proceedings. In thus defining the first element of the cause of action, the Florida court has been in complete accord with the great weight of authority elsewhere as expressed in the **Restatement.**

In our case only one of the defendants gave any information to the county solicitor. At least two others, not parties, gave him information. All did so at the solicitor's request. No one made a sworn charge, written or otherwise. The District Court, in removing from the jury the issue of whether the defendants instituted the prosecution, deprived them of their best defense. In approving the trial court's instruction, the Court of Appeals patently ignored the law of Florida.

II.

THE TRIAL COURT ERRED IN INSTRUCTING THAT IF ONE DEFENDANT WAS GUILTY, ALL WERE, THOUGH THE ONLY EVIDENCE OF MALICE OR OF INSTIGATION WAS AS TO BUT ONE DEFENDANT.

1. The issue of agency was properly raised but was withheld from the jury. It was alleged (R. 3) and denied (R. 5-6) that the Good Holding Company acting by its agents, Mr. and Mrs. Tucker, caused the plaintiff's arrest. The trial court early took the view that there was no agency question raised. (R. 64). He religiously adhered to this view (R. 296, 288) and instructed as follows:

> "If there is any liability in this case, if you gentlemen find any liability in this case to the plaintiff, then the conduct of these individuals, the defendants, makes the hotel liable." (R. 297).

Exception was entered to this charge (R. 289).

2. The only evidence of malice or of instigation was

as to but one defendant. There is not a shred of evidence that Mrs. Tucker played any active role in the prosecution of the plaintiff. In fact, the plaintiff, herself, testified that she and Mrs. Tucker had no differences (R. 63, 64), which was verified by Mrs. Tucker (R. 199). All Mrs. Tucker did was to admit to the solicitor that she managed the Good Company. From then on she played a passive role (R. 210-212). As to the liability of the Good Holding Company, there is not even a suggestion that any agent of the Company, other than the Tuckers, played any part in the prosecution of the plaintiff.

3. **An agent has no implied authority to institute a criminal prosecution for acts already done.** This is the precise holding of the Florida court in **Winn & Lovett Grocery Co. v. Archer** 126 Fla. 308, 171 So. 214, 217 (1936), where the court said:

> "There is a marked distinction between a false imprisonment or arrest caused by an agent for the purpose of protecting property, or recovering it back, and an arrest or imprisonment caused for the purpose of punishing an offender for an act already done. Ordinarily, there is no implied authority in a servant having the custody of property, to take such steps as he thinks fit to punish a person who he erroneously supposes has committed a crime against the property, and the trend of decision is against holding the master liable when the arrest has been made after the supposed crime has been committed, and not for the protection of his property or interests. In such cases the agent is presumed to have acted on his own account, for the vindication of justice since his agency relates solely to the property, and the act of punishing

the offender is not anything done with reference to it."

This rule is, apparently, also the rule elsewhere. 3 **Restatement, Torts** §673; 1 **Cooley on Torts** 416; 34 **American Jurisprudence** 758-759.

4. **The trial court erred in withholding the issue of agency from the jury.** There is not the slightest evidence of any express authority on the part of Owen Tucker. There is no evidence of any direct liability on the part of any defendant other than himself. There is, by settled local law, no basis for imputing Tucker's liability to his wife and her company if the arrest was caused for the purpose of punishing an offender for an act already done. The plaintiff's own testimony indicates that this was the purpose (R. 26, 30, 76, 42). To affirmatively instruct that the liability of one defendant established the liability of all was plainly in contradiction of Florida law.

III.

THE TRIAL COURT ERRED IN SO DEFINING MALICE THAT ANY PROSECUTION TO STOP STEALING WOULD BE MALICIOUS.

The trial court's instruction on malice was worded thus:

> "In a case of this character, malice does not have a technical meaning of a personal hatred or dislike of the individual prosecuted. It may mean that the person bringing about the prosecution was prompted by motives they consider advantageous to them in causing the prosecution to be brought about." (R. 298).

Exception was noted to this charge. (R. 289).

By this instruction, any prosecution to stop stealing of property in the custody of the instigator would be malicious, and if the prosecution failed, the instigator would be liable in damages. The effect of this charge is in direct conflict with the familiar proposition that the law does not favor actions for malicious prosecution, which is stated by the Florida court in **Florida East Coast R. Co. v. Groves,** 55 Fla. 436, 46 So. 294, 296 (1908):

> "If every man who suffers by the perpetration of a crime were bound under the penalty of heavy damages to ascertain before he commences a prosecution that he has such evidence as will insure a conviction, few prosecutions would be set on foot, the guilty would escape while conclusive evidence was sought for, offenses of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter."

IV.

THE TRIAL COURT ERRED IN ITS CHARGE ON THE MEASURE OF DAMAGES IN SPECIFYING ONLY THAT THE VERDICT COULD NOT EXCEED THE AMOUNT CLAIMED.

The District Court's instruction on the measure of damages was:

> "The amount of damages is a matter for you gentlemen to determine, an amount that you gentlemen as business men are authorized to determine not to ex-

ceed the amount claimed in the complaint in this case." (R. 298).

Exception to this charge was noted (R. 289).

The verdict and judgment were for $7000 (R. 304), though the plaintiff was in jail but one night and her subsequent employment was unaffected by her experience (R. 36, 43, 46). Another arrested employee, testifying for the plaintiff, stated that his subsequent employment was not affected by his arrest (R. 92).

It is the settled law of Florida that exemplary damages must be pleaded to be recovered, and that the ordinary allegations in malicious prosecution do not satisfy this requirement. **Winn & Lovett Grocery Co. v. Archer**, 126 Fla. 308, 171 So. 214, 222 (1936). There was, therefore, no predicate in this case for the award of other than compensatory damages. The jury was not so instructed. It is evident from the size of the verdict that the jury did not restrict itself to compensatory damages.

Three comparatively recent decisions from other jurisdictions make it clear that the award in this case was clearly out of line. In **Peel v. Brammett**, 298 Ky. 20, 181 S. W. 2d 448 (1944), the verdict for $7500 was held excessive, the court saying:

> "She showed no special or pecuniary damage except $150 for attorney fees for defence in the criminal prosecution, and aside from that item the only injury sustained by appellee justifying substantial damages were mental suffering and injury to her reputation."

In **Anderson v. Snell,** 57 Nev. 78, 62 P. 2d 703 (1937), the verdict was for $8600 and a remittitur of $6100 was ordered. And in **Curls v. Lenox Garage Co.,** 68 Ohio App. 285, 40 N. E. 2d 213 (1942), a verdict of $2500 was held excessive. The court stated that $500 for humiliation, mental anguish and punitive damages was adequate together with $782 for actual loss of wages. No recovery for damage to character or reputation was permitted, because plaintiff offered no evidence in support of such loss.

All of these cases, like ours, were malicious prosecution actions where the plaintiff had been prosecuted for embezzlement.

CONCLUSION

In this case, the jury returned a verdict for $7000 against a man, his wife, and her hotel, where the man had hired private detectives to investigate his wife's employees and surrendered the detectives' reports to the county solicitor at his request. The solicitor in turn caused the arrest of the employees, after conferring with the detectives, and failed to get convictions solely because he charged the wrong crime.

The verdict followed instructions given by the District Court which were in direct opposition to the settled law of Florida, the law that the court was bound to apply.

The Court of Appeals affirmed, refusing to apply or even discuss the clearly expressed law of Florida.

We join the dissenting circuit judge in saying that "the trial was not according to law in the points above discussed, and a new trial is due to justice." We add that the majority of the Court of Appeals, ignoring the doctrine of the *Erie* case, has entirely rewritten the Florida law of malicious prosecution.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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Attorneys for Petitioners.

[redacted]

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IN THE UNITED STATES SUPREME COURT

THE GOOD HOLDING COMPANY, CAROLYN G. GOOD TUCKER and OWEN TUCKER,

Petitioners,

versus

FRANCES B. BOSWELL,

Respondent.

RESPONDENT'S BRIEF

This brief is in opposition to a petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered March 8, 1949, rehearing of which was denied April 19, 1949, affirming the judgment of the United States District Court for the Southern District of Florida, entered on July 15, 1947, in a civil action for malicious prosecution.

OPINIONS BELOW

The opinion of the court below and a dissenting opinion filed on March 8, 1949 have been reported in 173 F. 2d 395.

STATEMENT OF THE CASE TO CORRECT INACCURACIES AND OMISSIONS IN STATEMENT OF PETITIONERS

In order to correct the inaccuracies and omissions of the petitioners in their statement of facts, the respondent submits to the learned court the statement of facts as found by the United States Circuit Court of Appeals for the Fifth Circuit and reported in **Good Holding Co. et al v. Boswell,** 173 F. 2d 395.:

"Frances B. Boswell brought this action against The Good Holding Company, a Florida corporation, Carolyn Good Tucker and Owen Tucker, wherein damages were sought for an alleged malicious prosecution.

"The complaint avers that the defendant corporation, acting through its president, Carolyn Tucker, and its agent and servant, Owen Tucker, together with the defendants, Carolyn and Owen Tucker, acting individually, maliciously and without probable cause instituted plaintiff's arrest and criminal prosecution on a charge of embezzlement, which charge was subsequently dismissed, after plaintiff had thereby suffered damages to her reputation, health, and ability to obtain employment.

"Defendants, in answer, admitted the arrest and dismissal of the charges, but (1) denied causing the arrest; (2) denied that the charges against plaintiff were filed maliciously and without probable cause; (3) disputed the agency of Owen Tucker for The Good Holding Company and for Carolyn Good Tucker; and (4) alleged that the information and warrant for plaintiff's arrest were filed by the county solicitor of Dade County, Florida, upon in-

dependent investigation, and the prosecution was therefore an act of the State of Florida, and was in no way caused by defendants.

"The case was tried to a jury, which returned a verdict for plaintiff in the amount of $7,000. A motion by defendants for a new trial was thereafter overruled.

"The material facts upon which decision must turn, **carefully deduced from a painstaking review of the voluminous record evidence,** disclose the following:

"In the year 1946, The Good Holding Company owned the Good Hotel, located at Miami Beach, Florida, in which it operated a cocktail lounge and bar, known as 'The Music Box Club'. Carolyn Good Tucker was the majority stockholder, president, and treasurer of the company, (R. 206) and with the assistance of a manager, she operated the Hotel and cocktail lounge. In the latter part of January, 1946, upon his release from the Army, Carolyn Tucker placed her husband of a few months, Owen Tucker, in direct management and control of the lounge and bar[1].

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1. "Although Owen Tucker testified that he was not in the employ of his wife or the Good Holding Company, and received no salary for his services, his own testimony patently refutes his contention:

Q. "In whose employ were you?"

A. "Well, that is a technical question. * * * When I got out of the Army about the twentieth of January my wife asked me to take over the cocktail lounge, * * * I had a lot of duties. * * * I worked about twenty hours and sometimes worked only eighteen but usually twenty hours a day. I had to get up and let the workmen in, in the morn-

Almost from the time he was placed in charge, Tucker, who had never had any previous experience in such work, was convinced that there was "something wrong in the cocktail lounge" (R. 102). A fluctuation in the cost of liquor sales, as revealed by the hotel auditor's report, confirmed his suspicion that employee thefts of either the liquor stock, or money received for liquor sold, were creating the discrepancies. He thereupon reinforced the locks on the liquor store room and display counters, and retained the keys himself (R. 74). He personally checked every bottle of liquor received and withdrawn (R. 75). When the losses and discrepancies from the operation of the lounge continued, Tucker began to suspect the cashier and other employees of pocketing money and receipts from sales, and fired a number of employees for that reason, or on that assumption. (R. 73, 102).

"In the course of replacing the employees discharged, plaintiff, having been recommended by an employment agency, was interviewed and employed by Tucker on March 18, 1946, as checker and cashier in the lounge. (R. 25). She was the fourth or fifth cashier to be hired by Tucker within a period of less than three months, and when she was accepted for the position, Tucker informed her, " * * * there was quite a bit of stealing going on in the

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ing at eight o'clock. * * * then I got dressed and acted as host. I would meet all the people and I could stay there and seat them and we had a little show for the people. I acted as Master of Ceremonies. I sang all the songs that the people wanted and I acted as one star. I filled all the orders of the bartenders. * * * I did all the hiring and firing * * *" (R. 94, 95)

cocktail lounge and that he intended to put a stop to it even if he had to throw everyone in jail in order to get the right one * * *." (R. 26, 30). About this time, Tucker also remarked to a bartender, afterwards discharged, that "he trusted nobody" (R. 74); that the "previous checker was being fired because he was sticking money right and left in his pocket" (R. 73); and that "he would teach the people a lesson down here in Miami, and he would put them into jail if he had to put the whole town into jail" (R. 76). This bartender testified that Tucker was "* * * just mean, that's all. * * *" (R. 82).

"As checker and cashier, it was plaintiff's responsibility to see that either cash or a signed check was received for each portion of the liquor stock sold. (R. 26). It was also her duty to balance the cash register account against the cash in the till every morning before leaving for home. She was on duty from 5:00 p. m. to 1:00 a. m. six nights per week, (R. 27) and while on duty was never supposed to leave her post, even being required to take her meals behind the cash register. (R. 138). There were two bartenders and two waiters employed in the cocktail lounge with her. At 1:00 a. m. every morning, when the lounge and bar were closed, plaintiff went over the day's receipts and cash on hand under Owen Tucker's supervision. (R. 27) Plaintiff testified that she always stayed after work with Tucker until she balanced her account, as shown by the register, with the cash on hand, even if it took an hour or more to do so. (R. 28, 133). Tucker, however, testified that her account was never balanced but one time; that discrepancies and shortages were always revealed at the end of the working day. In any event, in spite of the innumerable "irregularities" which both Tucker and his wife claimed they saw plaintiff commit during this period, and

in spite of her consistent shortages and failure to balance each day's receipts, (R. 132, 247), it is without dispute that plaintiff was never fired, or once threatened with discharge. To the contrary, shortly after she was hired, Tucker employed a Miami detective agency to watch her, the bartenders, and the waiters in the bar and lounge, apparently to confirm his suspicion that they were all stealing from the company. (R. 102). The detective agency had previously advised Tucker that no accurate check on his employees could be made until he first replaced his old cash register in the lounge, and old food register, with a new register which would provide a visible record of the amount of each charge as that charge was made. Tucker thereupon, on March 28th, installed a second-hand cash register which was supposed to record accurately all sales and receipts from the operation of the lounge, but there seems to be some question whether this register was working properly during the time the plaintiff was employed[2]. With this used machine, it then became plaintiff's responsibility to effect an accurate daily balance between the tally of sales visibly recorded by the register, on the one hand, and the cash in the till plus the signed checks on whiskey orders charged to hotel guests, on the other.

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2. "Tucker testified that "* * * On March 27th I bought the machine * * * I could not get a brand new machine. * * * It was checked before it went into my place of business. I checked it myself. * * * they claim that the machine is not working properly, * * * " (R. 167) and further:

Q. "It was not checked between March 29th and April 4, 1946; is that correct?"

A. "Only by myself." (R. 169).

"On March 29, 1946, one day after the installation of the second-hand register, Tucker and his wife took a trip to Cuba. Before leaving, Tucker, together with two detectives from the agency, took an inventory of the liquor stock in the cocktail lounge. (R. 217, 237). For the next three nights, while the Tuckers were gone, several detectives from the agency kept a constant watch over plaintiff, the waiters and bartenders, to determine if they were stealing either liquor or money from the Hotel. They observed the conduct of these employees and prepared written reports thereon, in which it was stated that plaintiff did not "know how to act in a respectable establishment, but persists in being 'rowdy', and thus giving the appearance of being cheap"; and further, that it was evident that "the checker, waiters, and possibly the bartender, are working together." In confirmation of the reports made, both Mr. and Mrs. Tucker and the detectives testified that on numerous occasions they had seen plaintiff register less cash than she received from a customer; ring up a lower charge than the normal price for liquor sold; and transfer money from the till to her purse. (R. 117, 201, 203).

"On April 2, 1946, after the return of the Tuckers from Cuba, the detectives and Owen Tucker took another inventory of the liquor stock in the lounge. This second, or "comparison inventory", was later filed with the detective agency and delivered to the Tuckers and it purported to reveal a discrepancy of approximately $311.65 in liquor unaccounted for[3]. The written report prepared by two

3. "Plaintiff offered this so-called 'comparison inventory' in evidence, and much testimony in dispute of its accuracy.

of the detectives, St. John and Canada, was also filed with the agency and thereafter submitted to the Tuckers. (R. 220).

"Shortly after receiving the written report from the detective agency, both Mr. and Mrs. Tucker went to the county court house to confer with the County Solicitor of Dade County, Florida.[4] They showed the Solicitor copies of the inventories and report of the two detectives, but did not bring the original records or papers (R. 268). Furthermore, they did not inform him that there had been "overages", as well as "shortages" while plaintiff had worked (R. 148); did not total the alleged shortages against the admitted overages during the same period (R. 147); did not report the fact that even when they, defendants, had acted as cashier in the lounge after plaintiff was arrested that the discrepancies and shortages had continued;[5]

It was shown that liquor prices thereon were 'plus or minus 10%', instead of being exact; that 'figures were computed by figuring 25 ozs. (of liquor) in 4/5th of a quart', although Archie St. John, one of the detectives who helped prepare the inventory testified that there were '26 ozs. in a fifth' and later only 22 ozs., finally admitting he was 'not sure' which estimate was correct. Apparently no allowance was made for wastage, and no overages in certain wiskeys were shown thereon." (R. 232, 270, 368-376).

4. "Both Tucker and his wife testified that they called at the Solicitor's office in response to a call from his secretary, and that they did not request plaintiff's prosecution." (R. 98).

5. "Mrs. Tucker's daughter, Catherine Leonard, had checked the cocktail lounge and bar while her mother and Owen Tucker were away on the trip to Cuba. However, she did

(R. 149) did not reveal that the cash register on which the inventories and report were based was a second-hand or used machine, and that there had been complaints concerning its accuracy (R. 167); and failed to disclose that the cocktail lounge and bar had been operated during the afternoons before plaintiff arrived for work by other employees, who also had access to the liquor stock (R. 273, 150, 248, 236), in order that they might be made subject to an independent investigation by the Solicitor. As a result of this consultation with the Tuckers, and after a subsequent interview with Owen Tucker and the two detectives, St. John and Canada, the County Solicitor drew up an information, and warrants of arrest were thereafter issued for every employee who worked in the lounge and bar, including the plaintiff. On the night of April 4, 1946, about 10:00 p. m., deputy sheriffs entered the cocktail lounge and arrested plaintiff,[6] two bartenders, and one of the waiters. A fourth employee named Burke, who was not present when the officers arrived, was arrested later. Plaintiff was locked in a cell in the county jail for the night with five other women, and was not released until the next

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appear on behalf of defendants at the trial, and is supposed to have been on a fishing trip that day." (R. 139, 141).

6. "Both Tuckers testified that they did not know plaintiff was to be arrested, and there was evidence that shortly before plaintiff was seized, that Owen Tucker introduced a new bartender to her, with the request that she acquaint him with his duties, as "Murphy (bartender afterwards arrested) won't be with us any longer". However, the detective Canada, whose testimony was not nearly so contradictory and inconsistent as that of the witness, St. John, testified that the Tuckers were present when

afternoon about 4:00 p. m., when one of her former employers in Orlando, Florida, wired her money with which to secure a bondsman, and she was thereafter released on bail under a charge of embezzlement. (R. 35).

"The criminal trial was held before the Criminal Court of Dade County on April 25, 1946, and it resulted in a dismissal of the charges and an acquittal of plaintiff and the other employees.[7] During the progress of the criminal trial, it was shown that Owen Tucker had remarked to his wife, within plaintiff's hearing, "Boy, we sure got the goods on them this time. Ten years for embezzlement is a long time", and that he afterwards "just smiled and just smirched or whatever you call it". (R. 42). (All Record References and emphasis hereinabove, supplied by Respondent).

PROCEEDINGS IN THE TRIAL COURT

The action to recover damages for malicious prosecution was tried before Honorable Dozier A. DeVane, United States District Judge and jury for a period of four days.

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the Solicitor stated that all four of the employees in the bar, including plaintiff, would be arrested. In any event, when plaintiff was seized, Tucker was apparently not surprised, as he did not intervene or offer any explanation in her behalf."

7. "Although appellant insists plaintiff was acquitted on a technicality, the record of the criminal trial which is before us reveals that her case was heard fairly on its merits, and that the charges against her were dismissed because of a failure of proof."

The jury had full opportunity to observe the demeanor and conduct of the witnesses and to determine their credibility. After all testimony and evidence were submitted, the Court charged the jury in accordance with the law of the State of Florida in an extensive charge which "when fairly considered in its entirety, substantially preserved all material issues in the case for the consideration of the jury." **Good Holding Co. et al. v. Boswell,** 173 F. 2d 395 at 401. The jury returned a verdict in favor of the plaintiff for $7,000.

Although adequate opportunity was had to challenge the oral charge of the Court to the Jury, no exceptions were taken or filed therto by the petitioners. (R. 290, 303).

The defendants thereupon moved for a new trial on grounds of newly discovered evidence and of error in the trial. This motion for a new trial was denied after hearing and argument of counsel on April 1, 1948 (R. 384). The judgment in favor of plaintiff thereupon became final and defendants appealed therefrom.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS

The judgment for the plaintiff was affirmed by the United States Court of Appeals for the Fifth Circuit by two members of the court on March 8, 1949. (R. 418). Petition for Rehearing was denied on April 19, 1949. (R. 418). One circuit judge dissented to both orders. The mandate was stayed for thirty days by an order entered on April 27, 1949.

Both plaintiff and defendants submitted elaborate briefs to the appellate court and cited and quoted from numerous Florida Supreme Court cases.

THE PETITION FOR WRIT OF CERTIORARI

The Respondent, herein, vigorously refutes the contention of the petitioners that "the local law (of the State of Florida) is clearly to the contrary". The respondent herein vigorously disputes the statement of the petitioners that the United States Circuit Court of Appeals erred in sanctioning the conduct of the United States District Court in presenting the case to the jury. The rule of **Erie R.R. v. Tompkins,** 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938) was followed and observed by both the District Court and the Circuit Court of Appeals.

The fact is that the Trial Court did follow and did even quote verbatim in his charge from the law of the State of Florida. Cf. R. 293-third full paragraph with **Florida East Coast R. Co. v. Groves** 55 Fla. 436, 46 So. 294, 296 (1908).

The Court's charge to the jury should not be segmented but should be read as a whole. Petitioners have sought to wrench portions out of the entire context and to set them off for distorted analysis. A reading of the charge as a whole will show careful observation of and conformance with the laws of the State of Florida by the Honorable Trial Court.

Respondent feels compelled to answer what her counsel feels to be an unfair innuendo made by Petitioners on page 6 of their Petition. Petitioners there state that

the two justices of the Circuit Court of Appeals in affirming judgment for the plaintiff "relied" on a decision which was reversed by the United States Supreme Court. This is the case of **Spurr v. U. S. 87 F. 701** (CCA 6th 1898), revd. 174 U. S. 728. That the case was reversed is true, but it was reversed upon entirely different grounds from that for which it was relied on by the Circuit Court of Appeals. (See 87 F. 701 at 713). Furthermore lest the impression be given that the Circuit Court of Appeals was not familiar with the fact of reversal, this fact was expressly brought to the court's attention in Respondent's brief to the Circuit Court of Appeals at page 26.

The Petition for Writ of Certorari should be denied.

BRIEF AND ARGUMENT FOR RESPONDENT

I.

THE TRIAL COURT IN ITS CHARGE TO THE JURY DID SUBMIT TO IT ALL OF THE PERTINENT OBLIGATIONS WHICH IT WAS INCUMBENT UPON THE PLAINTIFF TO PROVE IN ORDER TO SUSTAIN HER SUIT AND RECOVER.

1. **Petitioners' subheading "1" in Point I of their Argument is erroneous.** The Court was entirely correct in refusing defendants' request to charge as stated in subheading "1". Mr. and Mrs. Tucker both could have been and **were** liable for the arrest of the plaintiff even assuming, but not conceding, that they did not know plaintiff was going to be arrested. They employed the detectives (Mrs. Tucker consented to their employ) (R. 207)., and further arranged for their going to see the County Solicitor. They knew and read the detectives' reports even prior to their going themselves to see the County Solicitor. (R. 207). Further, it cannot be doubted that Owen Tucker knew that plaintiff was going to be arrested. At one point he testified "The detectives selected the people to be prosecuted" and that he did not know who were going to be arrested in advance of the actual arrest, (R. 120), but his subsequent contradictions (R. 121, 125, 146), leave no doubt that he did know who was going to be arrested. This conclusion is even more compelling when one considers the fact that he had new bartenders ready to take over (R. 121, 125) and heard the names of all of the individuals, including the plaintiff, given to the Assistant County Solic-

itor (R. 263, 264). Further, Mrs. Tucker testified: "The Cashier had to be the head of it or otherwise it could not go on." (R. 212).

It likewise is well settled that where private investigators or detectives bring about the arrest of an individual their principal is liable for their acts. See **North British Mercantile Ins. Co. v. Feldman** 149 F. 2d 582 (C.C.A. 4th 1945), where a verdict for the plaintiff, suing for malicious prosecution, was affirmed. There, the deputy insurance commissioner for the State of South Carolina and a fire detective of the National Board of Underwriters, of which the defendant was a member, believing Feldman to be guilty of arson, discussed their evidence with McLeod, a Solicitor for the State, who advised them to swear out a warrant for Feldman's arrest. The warrant was sworn out by the two investigators, but the charge was dismissed by the magistrate and the case was dropped. The Court, in affirming, stated that "it was a fair inference . . . that the investigation had been set in motion by the North British and that the officers who caused the arrest were acting in its behalf." (at P. 585).

The Court likewise referred to the fact that there was no direct evidence as to precisely what disclosures were made to the prosecuting attorney, and that the defendant insurer was not entitled to a directed verdict in such action. Similarly, in the case at bar the meagerness of the disclosures made to the County Solicitor by the defendants was apparent to the jury. The proof of full disclosure was upon the defendants and they palpably failed in this.

2. **The Trial Court in its charge to the Jury very specifically set out the issues.** Thus the court stated:

> "Now, before the plaintiff can recover a judgment for damages in this case you must find by a preponderance of the testimony introduced:
>
> 1. That the proceeding which was instituted in the Criminal Court of Record in and for Dade County, Florida, **was maliciously brought by the defendants.**
>
> 2. That there was no probably cause for the bringing of the action." (R. 294) (Emphasis supplied).

The quotation from the Court's charge (R. 298) on Page 14 of Petitioners' brief and on Page 5 of their Petition is torn from its context and presented for distorted analysis.

The Court charged the jury on no less than **eight** separate occasions that the law applicable to cases of this character is that the plaintiff has the duty of showing affirmatively a want of probable cause and malice. (R. 292, 293, 294, 295, 296, 297, 298 and 299). At page 298, the Court, after previously having so charged on seven occasions, stated:

> "Now, gentlemen, I am going to comment just briefly upon the testimony, but in doing so I want to make it clear to you that anything I say about the testimony has **no more weight than anything either one of the attorneys say about the testimony.**

"As I will charge you in a few minutes, you are the sole judges of the testimony * * * **act upon the testimony as you recall it.**

"I do want to point out **certain testimony** that I think might help you gentlemen in reaching your determination in this case.

"As you recall, the evidence shows that the prosecution of this plaintiff was instituted by the County Solicitor's office here. The mere fact that it was so instituted does not, in law, exonerate everyone of responsibility for malicious prosecution, so the fact that the record shows that this prosecution was instituted by the prosecuting attorney of this County does not entitle the defendants to a verdict in and of itself.

"On the other hand, the question that you have in analyzing **this testimony** is not whether or not the defendants brought about this prosecution, instituted it, but whether or not they in good faith made a full, fair and complete disclosure of all the facts to the prosecuting attorney, and when you sift the case down that is going to be what you gentlemen are going to have to decide on this testimony. There is some conflict there on that. * * *

"You gentlemen have got to decide who you believe.

"We have lots of testimony in here and while you are not to ignore the other testimony I merely call that testimony to your attention and point out to you gentlement the testimony that bears upon the real

issue in this case—whether or not there was a full and fair disclosure made and it is for you gentlemen to decide whether you believe the testimony of the plaintiff on that point or the testimony of the defendants on that point, and if you believe the defendants, then you would be compelled to find that a full and fair disclosure was made. If you do not believe that testimony and on the other hand believe the testimony of the plaintiff, then you naturally find and it follows that a full, fair and honest disclosure was not made.

"Now, gentlemen, as I have said, the plaintiff carries the burden of proof to prove by a fair preponderance of the evidence that there was malice in this case and that there was the absence of probable cause." (Emphasis supplied).

The Court here was commenting only on certain phases of the testimony. Thus the Court stated it was pointing out **"certain testimony"** and it was **"this testimony"** to which Petitioners refer in their Petition and Brief.

The Trial Court's instruction was in conformity with local law. The court, in so instructing the jury was following the law of the State of Florida. In **Florida East Coast Railroad Co. v. Groves,** 55 Fla. 436, 46 So. 294, at 297, the Supreme Court of Florida, in reversing a judgment for plaintiff, stated:

"We think the evidence clearly shows that **Mr. Meredith stated every material fact** bearing on the transaction to Mr. Taylor. The fact that Mr. Taylor

may have been mistaken in instituting the prosecution in Dade County does not affect the bona fides of Meredith.

"In the case of **Burnham v. Collateral Loan Co., 179 Mass. 268, 60 N. E. 617,** it is held: 'One who, believing that a crime has been committed, sends for a police inspector, and **fairly and truthfully discloses to him all matters** within the speaker's knowledge which he supposes to have a material bearing upon the question of the innocence or guilt of the person suspected, and leaves it to the officer to act upon his own judgment and responsibility as to whether or not there shall be a criminal prosecution, and does no more, cannot be held answerable in an action for a malicious prosecution in case the officer comes to a wrong conclusion and prosecutes when he ought not to do so." (Emphasis supplied)

In the **Groves** case no sworn or written charges were made by the defendant or any of its agents to the County Solicitor, and the Court did not comment on this and did not make this a basis for its decision. One certainly could be an instigator of criminal prosecution even though he filed no sworn or written charges personally.

See also **Stainer v. San Luis Valley Land & Mining Co.,** 166 F. 220 (C.C.A.8th) and **Hornin v. Montgomery Ward & Co.,** 120 F. 2d 500 (C.C.A.3d).

In the **Groves** case, supra, there was a full and fair disclosure of every material fact. In the case **sub judice** the Court fully instructed the jury as to this issue and the jury found that there was not a full and fair dis-

closure by the Petitioners to the County Solicitor of all of the material facts.

The United States Circuit Court of Appeals, in its opinion, 173 F.2d 395, at 398, lists some of the facts that were withheld by the Petitioners from the County Solicitor. See also 173 F. 2d 395, at 400.

3. In fact, the Trial Court instructed the jury on the very points which the Supreme Court of Florida, in the cases of **Ward v. Allen,** 152 Fla. 82, 11 So. 2d 193, at 194; **Tatum Bros. Real Estate v. Watson,** 92 Fla. 278, 109 So. 623; **Duval v. Smith,** 102 Fla. 717, 136 So. 878, at 880; and **S. H. Kress & Co. v. Powell,** 132 Fla. 471, 180 So. 757, at 762, set out as necessary to maintain the action of malicious prosecution.

In its charge the Court also stated (R. 292):

"In order to sustain her suit and recover, the plaintiff must show by a preponderance of the evidence:

"1. That the prosecution brought against her **was instigated by the defendants maliciously,** and,

"2. That it was without probable cause.

"The defendants have filed several defenses which may be briefly summarized to you as:

1. A denial of malice.

2. A denial of lack of probable cause.

3. A denial that they brought about the arrest and prosecution of the plaintiff.

"Now, that makes up the issues that you are to try in this case, the plaintiff by her complaint charging the defendants with the malicious prosecution of her for a criminal offense of which she was not guilty and for which, as the record shows, she has been acquitted, and the defendants by their answer state that they held no malice against the plaintiff; that they had probable cause to bring about her arrest if the evidence should show that they did, and at the same time denying that they brought about her arrest." (Emphasis supplied)

This fact as to who instigated the prosecution was clearly before the jury and they had ample evidence, after hearing the testimony, to find that the defendants **did** instigate the prosecution against the plaintiff. The defendants, of course, sought to give the impression that they knew nothing of the prosecution, knew nothing as to who originally called the matter to the County Solicitor's attention. They even sought to insinuate that an insurance company did so, but their testimony and the testimony of at least one of their witnesses, as stated by the Circuit Court of Appeals, **"measured only to evasion, inaccuracy, inconsistency, and contradiction"** Good Holding Co. vs. Boswell 173 F 2d 395, 399 (Emphasis supplied).

II.

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THAT IF THERE WAS ANY LIABILITY IN THE CASE, THE GOOD HOLDING CO. WAS LIABLE.

The facts as to the agency of the individuals were clear and precise to the jury. There could be no doubt as to it, considering the testimony of both Owen Tucker and his wife, Carolyn Good Tucker. Owen Tucker testified:

Q. "In whose employ were you?
A. ". . . when I got out of the Army about the twentieth of January, MY WIFE ASKED ME TO TAKE OVER THE COCKTAIL LOUNGE, to help HER run it . . . (Emphasis supplied) (R. 94)

* * *

Q. "What did you do at the Music Box Club from the time you returned from the Army from January through April five of 1946?
A. "I had a lot of duties. We just finished building the place and installing the air conditioning and had to start opening and a lot of work around there and I supervised that and I worked about twenty hours and sometimes I worked only eighteen, but usually twenty hours a day.

"I had to get up and let the workmen in, in the morning, at eight o'clock. Then I had to—by the time the workers got through in the afternoon, then I get dressed and acted as host. I would meet all the people and I could stay there and seat them and we had a

little show for the people. I acted as Master of Ceremonies. I sang all the songs that the people wanted and I acted as one star. I filled all the orders of the bartenders. I walked back to the stock-room to get the liquors and necessary things to run the bar with. I did all the hiring and firing and then I tried to oversee it and any other way I could to make it very nice. I did—" (R. 94, 95)

* * *

A. "Sometimes my wife would give me other duties to attend to in the hotel, and I had time once in a while to attend to other hotel duties for my wife." (R. 106)

Carolyn Good Tucker testified:

Q. "Are you the original owner and proprietor of The Good Hotel?
A. "I am. (R. 198)

* * *

A. "I am President and Treasurer. (R. 206)

Mrs. Tucker knew of and confirmed the hiring of the detectives.

A. "Yes, I wanted to find out who it was, doing the whole thing, and I wanted to find out, and I wanted to know also.

* * *

Q. "Now, after this investigation was completed did these three detectives make report?

A. "Yes, they did. They came to our pent-house and gave a written report.

Q. "Did you go with your husband at any time down to the County Solicitor?

A. "Yes. (R. 207)

There Mrs. Tucker confirmed what her husband told the County Solicitor. (R 159)

At no time did Mrs. Tucker ever disavow the agency or right of Owen Tucker to act both for herself and The Good Holding Co.

The Court, therefore, had full authority to withdraw the question of agency from the jury, inasmuch as based on the evidence presented reasonable men could not differ as to the fact that Owen Tucker and Carolyn Good Tucker were the agents of The Good Holding Co. 3 **A.L.I. Restatement of Torts,** Sec. 673, Page 438. (Comment on Subsection (2)).

While the appellants in their pleadings denied that the Tuckers were the agents of the Good Holding Company, nevertheless, at the trial they abandoned this position. On Page 64 of the Record, the Court, referring to the individual defendants' relationship to the corporate defendant, stated:

"They were the hotel agents. No issue made of it."

Counsel for the Appellants below, ready at all times and ever alert to voice his objections to any incorrect or irrelevant statement, stood by without a word of protest. Likewise, at P. 288 of the Record the Court stated: "Judge Price (counsel for Appellants) considered this case and tried this case on the theory that they are all liable or not liable." Here, too, counsel for Appellants voiced no protest or objection. Accordingly, the Court had the right to assume that there was no question made of the agency of both Mr. and Mrs. Tucker.

2. **The evidence as to malice and instigation was as to both individual defendants.** Mr. and Mrs. Tucker both employed or knew of the employment of the detectives (R. 118, 207, 247). Mrs. Tucker testified that she knew of the employment of the detectives and did not object thereto. (R. 199, 200). Further, she accompanied her husband to the County Solicitor's office to set in motion the prosecution of the four employees. (R. 159, 210, 211). The facts brought out in the evidence show the agency beyond any doubt and the corresponding liability of The Good Holding Co.

Mrs. Tucker was the principal stockholder, president and treasurer of the Good Holding Company. Mr. Tucker was the manager of the bar, employed and discharged employees, made all of the purchases for the bar, operated it generally, checked over the receipts at the end of the day with Mrs. Tucker, etc. Whether or not he received compensation is of no concern. At all events, he devoted his entire time and effort to this work and showed no other means of support. (R 119)

"Both Tuckers testified that they bore no malice or ill-will toward plaintiff, yet the record is replete with testimony of remarks made and action taken by them from which the jury could have inferred they acted maliciously and vindictively in causing her prosecution." **Good Holding Co. v. Boswell,** 173 F. 2d 395, 399.

It has often been held that mere knowledge by the employer of the action of a servant in prosecuting and causing the imprisonment of another, together with the fact that the employer took no step in disavowal of the action of his agent, was sufficient to constitute a ratification of the act of the agent and to sustain an action for malicious prosecution against the principal. In **Odom v. Tally,** 160 Miss. 797, 134 So. 163, at page 164, the Court stated:

> "On his own admission he knew that Appellant was in jail and he knew, or had sufficient facts before him to charge him with knowledge, that the imprisonment was on this particular charge, and at the instance of his agent; yet he took no step in disavowal and must therefore be held to a ratification."

All of the Florida cases in Petitioners' brief were before the United States Circuit Court of Appeals for the Fifth Circuit. Furthermore, respondent cited and quoted to the Court extensively from **S. H. Kress & Co. v. Powell,** 132 Fla. 471, 180 So. 757, and in her reply brief she cited four separate and distinct Florida cases, to-wit: **Ward v. Allen,** 152 Fla. 82, 11 So. 2d 193 (1943); **White v. Miami Home Milk Producers Ass'n.,** 143 Fla. 518, 194 So. 125; **Duval Jewelry Co. v. Smith,** 102 Fla. 717, 136 So. 878; **Winn & Lovett Grocery Co. v. Archer,** 126 Fla. 308, 171 So. 214.

Rspondent also quoted from **Seaboard Oil Co. v. Cunningham,** 51 F. 2d 321 (C.C.A.5th, 1931) cert. denied 284 U.S. 657, which case likewise arose in Dade County, Florida, and pertained to a malicious prosecution instigated by defendants in the same county solicitor's office in which the prosecution **sub judice** was instigated.

Petitioners' quotation on page 16 of their brief from **A.L.I. Restatement of Torts,** V. 3, Sec. 653, is in error. It is not the "sworn charge upon which a warrant of arrest is issued" that initiates the criminal proceedings as Petitioners would lead the Court to believe from their quotation, but the **person who presents** the charge who initiates the criminal proceedings. And it respectfully is submitted that it makes no difference whether the charge is sworn or not. See: **Florida East Coast R. Co. v. Groves,** 55 Fla. 436, 46 So. 294 at 295, where the information was given to the County Solicitor "over the telephone" and "no affidavit for criminal prosecution" was made. The exact quotation in A. L. I. Restatement of Torts V. 3 Sec. 653, at P. 382, starting with the second sentence is:

> "Thus, one who, personally or by a third person for whose conduct he is responsible under the law of agency, presents to a magistrate a sworn charge upon which a warrant of arrest is issued, initiates the criminal proceedings of which the issuance of a warrant is the institution."

Can it be gainsaid that a person is sufficiently an instigator of criminal prosecution and liable for his acts who knowingly withholds information from the County Prosecutor and fails to make a full and fair disclosure

to him of the facts? Owen Tucker was out to stop the irregularities "if he had to arrest everyone to make sure he got the right one." (R.30) With this interest in mind, he proceeded to the County Solicitor's office. This attitude was malicious in and of itself.

As stated hereinabove, the Trial Court did submit to the Jury the issue as to the instigation of the prosecution. This was done by the Court on two different occasions. (R. 292, 294.).

Further, "malice may be implied or inferred from want of probable cause" per Justice Terrell in **Duval Jewelry Co. v. Smith,** 102 Fla. 717, 136 So. 878, 880. See also: **White v. Miami Home Milk Producers Ass'n,** 143 Fla. 518, 197 So. 125 at 126. **Stewart v. Sonneborn,** 98 U. S. 187, 25 L. Ed. 116.

3. **The principal is liable for acts of its agents.** In a malcious prosecution action **S. H. Kress & Co. v. Powell,** 132 Fla. 471, 180 So. 757, at P. 760, the Supreme Court of Florida said in reference to managers of units or branches of a business:

> "In each unit or branch of the business is placed in authority one who is generally designated as the 'manager' of the local unit, and who usually has the authority to select and to discharge his employees, to place orders for merchandise with the parent organization, and in some businesses to purchase merchandise from other corporations. The 'manager' is responsible in a general way for the prosperity and welfare of the local unit of that particular business.

> He is not to be classed with a mere clerk or employee; he is a vice principal. To permit a corporation of this type to escape liability for the acts of its 'manager' on the ground that he is not one of the principal officers of the corporation and that he must have actual express authority to do the particular thing in question would be going entirely too far afield from the realities, because, for all practical purposes, the 'manager' is the head of the corporation so far as the local unit of the business is concerned, and wrongful acts of the 'manager' which are done in behalf of the corporation's interests there, if they cause injury or damage to another, will make the corporation liable."

The striking similarity between the duties of the manager in the above malicious prosecution action and the duties of Owen Tucker, one of the defendants below, is readily seen.

See also: **Hornin v. Montgomery Ward & Co.** 120 F. 2d 500 (C.C.A. 3rd) **Wheeler v. Nesbitt** 65 U.S. 544, 16 L. Ed. 765. Further, the Tuckers instigated the prosecution of all of their employees of the cocktail lounge to teach them a lesson and to teach a lesson to others who in the future might be in their employ and to put a stop to what he believed was stealing (R. 30, 59, 76). This is not in conflict with **Winn & Lovett Grocery Co. v. Archer** 126 Fla. 308, 171 So. 214, 217.

WE SUBMIT THAT ALL OF THE PETITIONERS ARE LIABLE.

III.

THE TRIAL COURT DID NOT SO DEFINE MALICE THAT ANY PROSECUTION TO STOP STEALING WOULD BE MALICIOUS.

1. **Petitioners in their brief once again have wrenched a portion of the Trial Court's charge for distorted analysis.** It respectfully is submitted that the Court's charge on the entire point should be considered rather than a small portion torn from its context. (R. 294 to R. 296)

Petitioners quote at page 21 of their brief from **Florida East Coast R. Co. v. Groves,** 55 Fla. 436, 46 So. 294, 296 (1908) to demonstrate the local law of the State of Florida. This very language was quoted almost verbatim by the Trial Court in its charge (R. 293). Respondent respectfully submits both the quotation from the charge and the quotation from **Florida East Coast R. Co. v. Groves** for the learned Court's own inspection:

"On the other hand, if every person who suffers by the perpetration of a crime is bound under the penalty of heavy damages to ascertain before he commences a prosecution that he has such evidence as will insure a conviction, few prosecutions

"If every man who suffers by the perpetration of a crime were bound under the penalty of heavy damages to ascertain before he commences a prosecution that he has such evidence as will insure a conviction, few prosecutions would be set on

would be set on foot and many guilty of crimes would escape punishment." (R. 293)

foot, the guilty would escape while conclusive evidence was sought for, offenses of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter." (Fla. East Coast R. Co. v. Groves at P. 296).

It likewise is significant that the very language of the charge to which Petitioners object on page 28 of their brief and page 5 of their petition is analogous to that of 3 **A. L. I. Restatement of Torts,** Sec. 668d. at P. 424. There the **Restatement** says in discussing malicious prosecution:

> "The principal situations in which criminal proceedings are initiated for an improper purpose are . . .
> "(3) Where the proceedings are initiated for the purpose of obtaining a private advantage . . ."

The Trial Court properly charged the jury as to the elements or conditions precedent to a recovery by plaintiff of a judgment for damages. Thus, the Trial Court stated:

> "Now, before the plaintiff can recover a judgment for damages in this case you must find by a preponderance of the testimony introduced:
>
> "1. That the proceeding which was instituted in the Criminal Court of Record in and for Dade County, Florida, was maliciously brought by the defendants.

"2. That there was no probable cause for the bringing of the action.

"Now, where an agent of a corporation, believing that a crime has been committed, states all the material facts bearing on the transaction so far as he was informed of them to a prosecuting officer of the County and furnishes him the names of witnesses who can give more detailed information and leaves it up to the prosecuting officer to act on his own judgment and responsibility as to whether there shall be a criminal prosecution and does no more, the fact that the prosecuting officer may make a mistake in instituting a criminal prosecution does not affect the bona fideness of the agent and the agent and the corporation represented by the agent cannot be held liable for malicious prosecution.

"If you find from the evidence submitted to you in this case that the defendants in this case were in any way instrumental in obtaining the information filed in the Criminal Court of Record in and for Dade County, and if you further find that the evidence submitted in the case shows that probable cause existed for making an arrest in the Criminal Court of Record, then under such circumstances, if there was probable cause, your verdict must still be for the defendants because both malice and lack of probable cause must be found to exist by you in a case of this character.

"Now, on the one hand, a defendant cannot be held liable for the malicious prosecution of another where he takes the case in question to a public prosecuting

officer as did the defendants in this case, and **in good faith fairly discloses to that officer all of the information he possesses** and he was advised that a crime had been committed and he has nothing further to do with the prosecution.

"On the other hand, a defemdant is sufficiently a prosecutor to sustain an actiom against him for the malicious prosecution if the prosecution to which the plaintiff was subjected was instituted at the defendants' insistence and request by a public official having authority for such purpose and the person bringing about the prosecution failed to make a full and fair disclosure to the prossecuting officer of the facts in the case as he knew them.

"Now, gentlemen, I have told you that there are two elements that are necessary for you to find in this case before you can find a verdict for the plaintiff.

"1. You must find malice on the part of the defendants.

"2. You must find the lack of probable cause.

"In a case of this character, malice does not have a technical meaning of a personal hatred or dislike of the individual prosecuted. It may mean that the person bringing about the prossecution was prompted by motives they consider advantageous to them in causing the prosecution to be brought about.

"Where a person believes that a crime has been committed by someone in his employ but **is without**

knowledge as to which of the group committed the crime and brings about a prosecution of the entire group in an effort to punish the one guilty, he would be guilty of malicious prosecution of those innocent of the offense. There would be no ground upon which he could bring about the prosecution of those innocent where he had nothing to indicate their guilt and he brought about the entire prosecution to serve his own interest.

"Now, malice, gentlemen, is something that exists in one's own mind and as it is impossible for you as jurors to enter the mind of the defendants in this case and determine what prompted them to bring about the investigation leading to the prosecution of the plaintiff you are to judge whether or not the defendants are guilty of malice by the evidence bearing upon what transpired at the time and what motive activated the defendants to bring about the prosecution.

"You must, of course, find that the element of malice and the element of lack of probable cause are present in this case before you can find the defendants liable in damages to the plaintiff for her arrest and prosecution." (Emphasis supplied). (R. 294, 295, 296).

The Trial Court in charging that "malice is something that exists in the mind" was guided by the language of Mr. Justice Day in **Brown v. Selfridge,** 224 U. S. 180, 56, L. Ed. 727, 32 S. Ct. 444, where Mr. Justice Day stated, at page 446:

"While it is true that the want of probable cause is required to be shown by the plaintiff, and the burden of proof is upon her in this respect, such proof must necessarily be of a **negative character,** and concerning facts which are principally within the knowledge of the defendant. **The motives and circumstances which induced him to enter upon the prosecution are best known to himself.** This being true, the plaintiff could hardly be expected to furnish full proof upon the matter. She is only required to adduce such testimony as, in the absence of proof by the defendant to the contrary, would afford grounds for presuming that the allegation in this respect is true. (1 Greenleaf Evidence, Sec. 78.) In other words, the plaintiff was only obliged to adduce such proof by circumstances or otherwise, as are affirmatively within her control, and which she might fairly be expected to be able to produce." (Emphasis supplied).

IV.

THE CHARGE OF THE TRIAL COURT AS TO DAMAGES WAS IN COMPLETE ACCORD WITH FLORIDA LAW.

Respondent submits that petitioners have completely misinterpreted the holding in **Winn & Lovett Grocery Co. v. Archer** 126 Fla. 308, 171 So. 214, and in their brief at P. 22 have cited it **contra** to that principle for which it actually stands. In the **Winn & Lovett Grocery Co.** case the Supreme Court of Florida held at P. 222:

> "In order to recover exemplary or punitive damages, the declaration must allege some general facts and circumstances of fraud, malice, gross negligence or oppression tending to show plaintiffs right to recover such damages in addition to damages by way of compensation. But punitive or exemplary damages **need not be described or demanded** in the Declaration by that name in order to be recoverable." (Citations omitted) Emphasis supplied).

The Court further stated at page 222 and 223:

> "But a tort committed by mistake in the bona fide assertion of a supposed right, **but absent any element of malicious motive or wrong intention, or circumstances of recklessness or gross negligence in conduct amounting to the same thing,** will not warrant the giving of exemplary or punitive damages extra compensation for the elements of aggravation that are

authorized to be included in the compensatory award under the rule of Smith v. Bagwell, 19 Fla. 117, 45 AM. Rep. 12). (Citing cases).

"The foregoing conclusion is so because elements of damage such as for indignity suffered, humiliation experienced, and the like are allowed as compensation for the injury and as the money value equivalent to plaintiff of the legal right of peaceful security plaintiff has been deprived of by defendant's tortious wrong. Compensation for such elements of damage is recoverable irrespective of whether the defendant's tort was committed intentionally or by mistake with good motive or with bad motive, advisedly, or on impulse. **Punitive or exemplary damages are allowable,** however, solely as punishment or "smart money" to be inflicted for the **malicious or wanton** state of mind with which the defendant violated plaintiff's legal right, and can only be imposed in cases where either by **direct or circumstantial evidence some reasonable basis for an inference of wantonness, actual malice, deliberation, gross negligence, or utter disregard of law on defendant's part may be legitimately drawn by the jury trying the case."** (Emphasis supplied).

See also: **Stewart v. Sonneborn** 98 U. S. 187, 25 L. Ed. 116. **Walton Trust Co. v. Taylor** 2F 2d 342 at 348 (C.C.A. 8th)

Respondent alleged in her complaint the causing of her arrest by the petitioners and her prosecution on charges of embezzlement "was unwarranted, unjust, without reasonable or probable cause or justification, and with

malicious intent to embarrass, humiliate, harm, damage and injure the plaintiff, Frances B. Boswell." (R. 4). The testimony amply bore out respondent's contention. The jury so found.

It is further claimed that the amount of award in damages is disproportionate to the harm and injury suffered by the plaintiff. This was a matter entirely within the province of the jury. Perhaps, they had in mind the familiar quotation from Othello, Act III, Scene 3: "Who steals my purse steals trash; . . . **but he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed."**

The respondent was damaged in reputation, in health and in ability to seek and retain employment. She was robbed of her good name. She was unable to pull herself together. The employment agency refused to send her on another job because of the arrest. (R. 37). She worked at the Red Coach Grill, but left because Mr. Tucker came in. (R. 36). She worked at Smiths Drive-In (R. 43), but left for her home at Indianapolis. She was afraid of being hounded. (R. 43). She was nervous and irritable. She feared that people would say, "You were arrested over there." (R. 44). She was under the care of a physician (R. 44).

At all events, her entire life was disarranged, distorted, mangled; not a simple matter for a young woman.

The foreign cases which petitioners cite are clearly distinguishable from the case at bar.

In **Peel v. Brammett,** 298 Ky. 20, 181 S. W. 2d 448, the Court, on page 451, in distinguishing a case, **W. T. Grant Company v. Taylor**, 223 Ky. 812, 4 S. W. 2d 741, 744, where a verdict of $12,500 had been granted, stated that in the Peel case "appellee was given full time and opportunity to adjust or explain her accounts and to demonstrate her innocence even **before** any prosecution was instituted." No such opportunity was ever given to the resondent herein.

Anderson v. Snell, 57 Nev. 78, 62 P 2d 703, may be differentiated from the present instance for there the remittitur referred to by the Petitioners had been **ordered by the trial** court and **accepted** by the plaintiff, and therefore, the question of the remittitur never came before the appellate court.

In **Curls v. Lenox Garage Co.,** 68 Ohio App. 285, 40 N. E. 2d 213, as distinguished from the case **sub judice**, "the defendant made some efforts to stop the prosecution. This feature of the case must be considered on the question of malice justifying an award of punitive damages." (at page 215). In the case **sub judice** not only did the defendants not make any efforts to stop the prosecution, but they continued to withhold pertinent information and facts from the County Solicitor (cf R. 137, 148) and as evidenced by the uncontradicted statement of Owen Tucker to his wife (R. 42) their malice even mounted and grew.

CONCLUSION

The case **sub judice** can be summed up in a few short paragraphs:

It cannot be gainsaid that Carolyn Good Tucker was the alter ego of The Good Holding Co. She was its president, treasurer and principal stockholder. Her husband, Owen Tucker, managed the cocktail lounge. He had authority to hire and fire employees there. He trusted no one. (R. 74). He was going to "teach the people a lesson down here in Miami and he would put them in jail if he had to put the whole town in jail." (R. 76). "He thought everybody was stealing from him." (R. 86). "He was going to stop it if he had to arrest everyone to make sure he got the right one." (R. 26, 30). All of these statements were uncontradicted and undisputed. His wife, Carolyn Good Tucker, was of the opinion "the cashier had to be the head of it, or otherwise it could not go on." (R. 212). Together he and Mrs. Tucker, although Mrs. Tucker had discovered irregularities in accounting for cash "before and at the time and after" the employment of the respondent (R. 199) caused the County Solicitor to institute criminal proceedings against and to arrest all of their cocktail lounge employees in an attempt to put a stop to what they believed was stealing by some individual, but which in reality seems to have been the result of a faulty taking of inventory. (R. 232 and 368 to 376).

The testimony of the defendants and at least one of their witnesses was characterized by the United States Circuit Court of Appeals as measuring only **"to evasion, inaccuracy, inconsistency and contradiction."** 173 F 2d 395

at 399. These very individuals sought to exculpate themselves from liability upon the ground that they did not instigate the prosecution of the respondent. However, all plausible testimony pointed to the contrary and the jury in rendering its verdict so found. The jury was instructed by the Court "not to be swayed, in the performance of your duty, by prejudice, sympathy, sentiment or passion, but must discuss this case fairly and impartially upon the law which the Court has given you and upon the evidence submitted." (R. 300). The jury heard all of the evidence, saw the witnesses, noted their demeanor, candor and forthrightness or lack of it, were able to determine their interest in the matter, whether they spoke the truth or indulged in falsehood; and after careful deliberation, brought in its verdict for the plaintiff.

There are no special and important reasons for the granting of any Review on Writ of Certiorari herein. No important question of local law was before the Trial or Appellate Courts. Whatever questions that were before the Courts were submitted to the Jury and were decided by the United States Circuit Court of Appeals in accordance with the law of the State of Florida. Certain it is that they were **not** decided "probably in conflict with applicable local decisions".

The Trial Court, in its conduct of the case and in its charge to the jury, considered and followed the law of the State of Florida, as enunciated by the Supreme Court of the State of Florida, and followed the doctrine of the United States Supreme Court as laid down in the case of **Erie Railroad v. Tompkins**, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

It is respectfully submitted that there is no conflict with the applicable local decisions of the State of Florida and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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